

## LAND TITLE TRANSFER: A REGRESSION\*

By MYRES S. McDOUGAL † and JOHN W. BRABNER-SMITH ‡

If you find you can't reply to your  
opponents, why don't try to —  
Call them Un-American . . .  
Simply throw a few red herrings  
and with patriotic fire  
Call them Un-American.

HAROLD ROME,  
—*Pins and Needles.*

"LAND is the basic asset of society. Its ownership affords the security upon which our complex credit structure rests. Certainty as to ownership is essential to the continued peace of each landowner or farm owner." So Professor Powell grounds his study of land title registration — "the Torrens system"<sup>1</sup> — deep in concern for the public welfare. He could have grounded it deeper. Today our accepted social goals include something more than peace. Public opinion is mobilizing behind maximum utilization for the benefit of all classes. Our governments — federal, state, and municipal — are committed to a program of reconstructing our cities and rehousing at least a third of the nation.<sup>2</sup>

---

\* A review of: REGISTRATION OF THE TITLE TO LAND IN THE STATE OF NEW YORK. With Supplements as to Experience Elsewhere. Prepared by Richard R. Powell for the New York Law Society under a grant from the Carnegie Corporation. The New York Law Society, 1938. Pp. xviii, 315. The members of the New York Law Society, "not in agreement among themselves" and "without agreeing with or dissenting from, Professor Powell's conclusions," offer his book "as a collection of factual data and suggested conclusions constituting a valuable contribution to the subject." Hereinafter cited simply as POWELL.

† Associate Professor of Law, Yale University.

‡ Formerly Special Assistant to the Attorney General of the United States.

1. So named from Sir Robert Richard Torrens who first introduced the system into Australia in 1858.

2. Business men are even looking to a small home building boom to take us clear of the depression. Both "government" and "business" seek, by reducing cost, to facilitate home ownership and to stimulate building. Lowered interest rates, reduced brokerage fees, extended loan amortization periods, standardization of materials, prefabrication of building parts, and large scale production—such are some of the results of far-reaching efforts to whittle a few dollars here and a few dollars there; but nothing is being done about the high costs of title search.

Humanitarian sentiment, in the guise *inter alia* of land-purchase programs, has even begun to extend to the pitifully insecure one-half of our farm population.<sup>3</sup> City planning, rural rehabilitation, metropolitan communities, and garden cities; public subsidies, government financing, graded-tax plans, zoning, and eminent domain—all these are in the headlines and in the air. It takes no prophet to foresee that fundamental reforms in land utilization are hot upon us. Yet for the achievement of such reforms without payment of undue and continued tribute to private monopolies and without fruitless bother and delay—perhaps even if they are to be achieved at all<sup>4</sup>—major changes must be effected in our antiquated, pre-commerce “system” of land transfer. Cheap, expeditious, and secure methods must be designed, if they are not already available, to replace the present complicated and dilatory methods which, while costly to the individual and burdensome to the public, afford no adequate security of title.<sup>5</sup> Streamlined need cannot long endure horse-and-buggy obstacles to the liquidity of land. It is an ancient query, but its relevance grows: why should not a lot or a farm be as easily acquired and as securely held as a ship or a share of stock or an automobile?<sup>6</sup>

Why *cannot* a lot or a farm be so easily acquired and securely held? The answer can be found in any courthouse. It is in the wild disorder and the incompleteness of the public records. First, the disorder. Suppose a bank had been in business 100 years with 100,000 customers and had repeatedly honored some thirty different kinds of instruments against each account, copying each instrument serially into big books, before returning it to the customer, and keeping only alphabetical indexes—thirty different indexes—to these books.<sup>7</sup> Imagine the expense and delay which might ensue in determining a customer's balance every time he demanded a little money. Preposterous as it may seem, that is a comparison not unfair to our “indigenous” system of land title “recording”

3. REPORT OF THE PRESIDENT'S COMMITTEE, FARM TENANCY (1937).

4. To costs, add the psychological deterrence in non-liquidity and insecurity.

5. Title is here used simply as a generic term to refer to any judicially recognized cluster of “rights, powers, privileges, and immunities” about land. It is sometimes said that the difference between the Torrens and recordation systems is that the one involves registration of *title* and the other of the *instruments* of title only. See PATTON, REAL ACTIONS AND PROCEEDINGS (1936) 6; PEYSER in HANDLER, CASES ON VENDOR AND PURCHASER (1933) 666; Cushman, *Torrens Titles and Title Insurance* (1937) 85 U. OF PA. L. REV. 589, 592. This is a misleading antithesis, confusing different levels of abstraction. Factually, the Torrens system is just a different, and more efficient, way of keeping the public records.

6. For full development of the automobile analogy see Comment (1939) 48 YALE L. J. 1238.

7. This illustration is adapted from HOPPER and FAIRCHILD, A SKETCH OF THE TORRENS SYSTEM OF LAND TITLE REGISTRATION (1916) 13. It is used also, in modified form, by Viele, *The Problem of Land Titles* (1929) 44 POL. SCI. Q. 421.

inherited from the Pilgrim Fathers.<sup>8</sup> "The fact is," Professor John R. Rood has written,<sup>9</sup> "that the path of the searcher for a safe title to land . . . is beset by more traps, sirens, harpies, and temptations, than ever plagued the wandering Ulysses, the faithful Pilgrim, or the investor in gilt-edged securities." Such a searcher must go back to a good "root" of title, varying in different states from 40 to 60 or a 100 years or more, and come down to date.<sup>10</sup> As he ploughs through the Joneses, Smiths, and Johnsons and through the deeds, mortgages, judgments, taxes, and mechanics' liens he can never be sure that he isn't missing something fatal to his title.<sup>11</sup> Worse yet, all this laborious retracing of the tortuous path of title is perpetual motion. Every time the land is sold or mortgaged or subdivided—no matter into how small parts<sup>12</sup>—it all has to be done over again; or else private title plants, better ordered than the public records, must be constructed and maintained at great expense.<sup>13</sup> Furthermore, whether our searcher maintains a plant

---

8. For the history of recordation see Beale, *The Origin of the System of Recording Deeds in America* (1907) 19 GREEN BAG 335; Reeves, *Progress in Land Title Transfers; the New Registration Law of New York* (1908) 8 COL. L. REV. 438.

9. Rood, *Registration of Land Titles* (1914) 12 MICH. L. REV. 379, 383.

10. Why does he have to go so far back? "Well, the answer is that the Lord only knoweth when possession is adverse, and all title lawyers will tell you that adverse possession is an exceedingly shaky basis for titles." White, *The Title Game* (1929) 8 TITLE NEWS No. 11, pp. 5, 6. There is also the competition among searchers, lawyers or title companies, who keep driving each other further back.

11. For excellent amplification see McCormick, *Possible Improvements in the Recording Acts* (1925) 31 W. VA. L. Q. 79. The common-sense remedy for a part of the difficulties here outlined is, as Professor McCormick urges, a tract index and that remedy has already been adopted in a few stray states and localities.

12. Viele, *supra* note 7, at 425, quotes an apt story from the N. Y. Herald: "Lately the Jumel property was cut up into 1,383 parcels of real estate and sold at partition sale. There appear to have been about three hundred purchasers at the sale, and no doubt each buyer, before he paid his money, carefully employed a good lawyer to examine the title to the lots he bought. So that 300 lawyers carefully examined and went through the same work of examining the old deeds and mortgages and records affecting the whole property. Each searched the same index of names, picked out from the 3,500 volumes of deeds and mortgages in the New York City recorder's office the same big, dusty volumes, lifted them down and looked them through—in all, 300 times, the very same labor. Evidently, 299 times that labor was thrown away—done over and over again uselessly. And the clients—the buyers—together paid 300 fees to those lawyers, who each earned his money, but 299 of those fees were for repetitions of the same work. By and by, twenty years from now, instead of 300 owners of these Jumel plats, the whole 1,383 lots will have been sold and built upon. And, time and again, when these 1,383 lots are sold, 1,383 new purchasers will again pay 1,383 lawyers 1,383 fees for examining the same Jumel title; only the fees will be larger, for there will—by that time, at the present rate of growth—be fully 10,000 big folio volumes."

Russel and Bridewell in *Land Title Examination: An Appraisal* (1938) 14 J. LAND & PUB. UTIL. ECON. 133 use this story and credit it to P. H. Mulholland, *The High Cost of Title Search* (November, 1936) AMERICAN BLDG. ASS'N. NEWS. 513.

13. Eventually such plants give their owners all the powers and privileges of monopoly. For elaboration see GAGE, LAND TITLE ASSURING AGENCIES (1937) 150; Smith,

or continually retraces his steps, the accelerating fecundity of the records, added to the disorder, scarcely lessens his labors.<sup>14</sup>

Next, the incompleteness of the records. Here again the perils are legion. In simple truth the notion that we have anywhere in this country (apart from the Torrens statutes) any such thing as "record title" is sheer delusion.<sup>15</sup> There are too many facts affecting the validity of a title which not only do not appear in the records but which often cannot be ascertained by any reasonable search outside the records. Contributors to the literature of land transfer — other than Professor Powell — have vied with each other in the number of such facts they could list.<sup>16</sup> Among the most frequently recurring items are: adverse possession and prescriptions; forgeries and other frauds; matters of heirship, marriage and divorce; copyists' and recorders' errors; infancy, insanity, and other disabilities; authority of corporate officers; invalidity of acknowledgments; identity of persons; invalidity of mortgage foreclosures and of judgments and decrees; want of legal delivery of instruments; violations of the usury laws; unprobated wills, praetermitted heirs, and posthumous children; falsity of affidavits; revocation of powers of attorney by death or insanity; parol partitions and dedications; inchoate mechanics' liens; extent of restrictive covenants; non-recordation of prior government patent; and facts about boundaries.<sup>17</sup> Such are some of the hazards external to the records which may disturb the peace of the faithful searcher for an indefeasible title. Obviously, for even the most scant

---

*The Insurance of Titles to Property* (1932) 8 J. LAND & PUB. UTIL. ECON. 337, 343. The latter writes: "It (title abstracting) is also a 'natural' monopoly, just as are the enterprises of furnishing telephone service, gas, electricity, and other public utilities to the community . . . Furthermore, the existence of a competing organization is by its very nature an economic waste, just as would be the duplication of telephone, water, or gas systems in the community."

14. POWELL, 6 n. 9. "Hassam—*Land Transfer Reform*, 4 HARV. L. REV. 271 (1891) shows the rapidity of this increase in Suffolk County (Boston). To 1700 only nineteen books of records were needed. Between 1700 and 1800 there were 174 more. By 1890 the number had become 1974, and the number of instruments recorded in that county in one year occupied 60 volumes.

"This process of acceleration has continued. In the County of New York, deeds alone filled an average of eighteen volumes a year, for the period of 1756-1890. Since 1891 these same instruments have required sixty-four volumes per year."

15. Persuasively stated by Chaplin, *Record Title to Land* (1893) 6 HARV. L. REV. 302.

16. See for examples: Chaplin, *loc. cit. supra* note 15 and in *The Element of Chance in Land Title* (1898) 12 HARV. L. REV. 24; Rood, *loc. cit. supra* note 9; Restatement, Sales of Land, (Tent. Draft No. 1, 1935) 57; Haymond, *Title Insurance Risks of Which the Public Records Give No Notice* (1928) 1 So. CAL. L. REV. 422 (cases collected); Ballantine, *Title by Adverse Possession* (1918) 32 HARV. L. REV. 135; Beale, *Registration of Title to Land* (1893) 6 HARV. L. REV. 369 indicates how the Torrens system overcomes many of these difficulties.

17. One experienced title examiner ends up with a cautious "and so forth." PATTON, *op. cit. supra* note 5, at 28.

security he must go much beyond the official sources of information. Often he does not go far enough. Is it any wonder that volumes of reports are filled with cases about "marketability" of titles and that court calendars are crowded with actions to quiet title?<sup>18</sup>

So much for the record and non-record roots of our contemporary insecurities of title. What brings these insecurities to full bloom is the barbarous principle of *caveat emptor*.<sup>19</sup> Darling of the courts on most occasions, he who here gets the judicial axe is the bona fide purchaser for value. Whatever pre-purchase caution he may exercise, however carefully he may scan public and private sources of title, if someone comes along with a title "prior" to that of his vendor, he is left *sans* land. What is his recourse in case of such loss? Can he go back on his vendor? Only if he has had the foresight to exact a deed with covenants of warranty; and even then only if his vendor is still available, solvent, and unable to escape through some of the loopholes in the highly technical judicial doctrines about covenants.<sup>20</sup> Can he go back upon his lawyer or abstractor? Only if he can charge them with "negligence," notoriously a difficult feat; and even then he may be able to get execution against nothing more than a second-hand typewriter.<sup>21</sup> Can he go back upon a title insurance company? Only if he personally has had the foresight and means to pay comparatively large sums for such protection and has obtained a policy which does not except the particular defect by which his trouble was caused. Even then he may lose any interim increment in the value of the land or the value of any improvements.<sup>22</sup>

Let us now suppose that some reasonably prudent man—some "rational" seeker for the "good life"—were to set out to reform this mess. What steps would he take? First, he would undoubtedly make provision for getting rid of existing stale claims and threats by a cheap and expeditious procedure for quieting titles or by a short Statute of Limitations or by both. Next, once the account of any particular lot or farm or other convenient unit of land in single ownership had been balanced by such new procedure, he would require a common-sense change in the

---

18. For rough working documentation, we are content with the 129 page chapter on Marketable Title, the 50 page chapter on Recordation, and the 57 page chapter on Covenants for Title in HANDLER, *op. cit. supra* note 5, at 173, 624, 675. If questioned, we will throw in the rest of HANDLER and odd chapters from KIRKWOOD, CASES ON CONVEYANCES (1932) and from AIGLER, CASES ON TITLES (2d ed. 1932).

19. See MAUPIN, MARKETABLE TITLE TO REAL ESTATE (3d ed. 1921) c. 5 Caveat Emptor. This maxim is somewhere described as "the most conspicuous landmark in the outlines of the law of property." See critical note in (1920) 19 U. OF MO. BULL. L. SER. 33. Cf. Comment (1926) 15 CALIF. L. REV. 53.

20. Once a purchaser accepts a "deed" without covenants he is left to the mercies of chance. Contrast the paradoxical implication of a condition of "marketability" into the "contract" of sale.

21. GAGE, *op. cit. supra* note 13, at 52.

22. *Id.* at 90 *et seq.*

method of keeping the public books. This change would take the form of a new and improved "tract" index.<sup>23</sup> So far as possible all the facts about the title to any one piece of land, whatever the convenient unit, would be entered on one page, a "register" page. Where the interests making up a "title" are unusually complicated, memorials on the register page could refer an examiner to the filed documents creating such interests. For convenience a copy of the register page, called a certificate of title, would be given to the owner. On subsequent voluntary transfers of the land, for double protection against fraud, surrender of this certificate would be required in addition to the vendor's deed. Then a new register page, with all obsolete entries removed, would be opened for the purchaser and a copy handed to him. And so on. Transfers of less than the fee would be memorialized on both the register page and the certificate, and the documents effecting such transfers filed. Involuntary transfers could be made only on order of the court making the transfer.

With the public records at long last in acceptable order, our bold reformer could then proceed to kill *caveat emptor*, protect the bona fide purchaser, and so create a new security of title. This he would accomplish by making the public records as nearly conclusive, as nearly unimpeachable, as is constitutionally possible. He would need to except only the Federal Government and persons in actual occupation of the premises, making adverse claim, on the date of the initial registration.<sup>24</sup> No other claimants to any piece of land could get their claims honored, against bona fide purchasers for value, who did not have such claims properly entered in the public register. Under such a system, there could scarcely be need of an insurance fund to protect purchasers. Yet occasionally an odd claimant of an interest less than the fee might fail to get his interest properly registered because of oversight or error by a public official. For the protection of such claimants an ample fund could be collected by imposing on the first registrant a small fee (of not more than one-tenth of 1 per cent of the value of the land).<sup>25</sup>

Should our estimable reformer now, by chance, turn to any of the voluminous literature on the Torrens system,<sup>26</sup> he would find that his

---

23. As indicated above, tract indexes are already used in a few states and communities. They are also used by title companies in their own private plants.

24. These hazards are not great. The Federal Government already offers some coöperation; more might be obtained. An appropriate statute has been drafted by the Sub-Committee on Law and Legislation of the Central Housing Committee. See RUSSELL and BRIDWELL, *supra* note 12, at 143, 144. POWELL, 51.

Even Professor Powell concedes that the "practical seriousness" of the risk of adverse possessors on the date of the initial registration is "probably not very great." POWELL, 141.

25. For more technical and more detailed descriptions see: PEYSER in HANDLER, *op. cit. supra* note 5, at 664; GAGE, *op. cit. supra* note 13, at 133; Comment (1939) 48 YALE L. J. 1238.

26. There is a comprehensive bibliography in POWELL at 295-314.

ideas had long been anticipated. Substantially the system he advocates has had an honorable history in Europe of over five hundred years.<sup>27</sup> Its present use spreads wide about the world. It "prevails throughout" Germany (including Austria), Hungary, Australia, Tasmania, Papua, New Zealand, Fiji, the "great majority of the provinces of Canada," and other scattered British colonies and protectorates.<sup>28</sup> It is of "large importance" in England and Ireland. In the United States at least five states — California, Illinois, Massachusetts, Minnesota, and Ohio — have had substantial experience with the system. Statutes have existed in fourteen other states.<sup>29</sup> The system has had the approval of the American Bar Association<sup>30</sup> and of the Commissioners on Uniform State Laws and has even been embodied in a uniform statute.<sup>31</sup> It has had the blessing and active support of a long line of distinguished and disinterested scholars.<sup>32</sup> Predictions have long been current that title registration must inevitably, because of its easily demonstrable superiority, supersede title "recordation" throughout the country. Dissenting voices have usually come from those whose interests were obviously served by the existing chaos.

Hence, it is with shock that an informed reader of Professor Powell's recent, exhaustive study<sup>33</sup> comes upon certain heavily italicized conclusions. These conclusions are, in sum, that a voluntary registration law cannot be made to work in the State of New York without an impracticable, heavy public subsidy and that the "enactment of any law making registration compulsory is not justified."<sup>34</sup> "Such a (compulsory) law," he italicizes,<sup>35</sup> "could be justified only by the existence of a reasonable probability that title registration would operate better than recordation. Such a reasonable probability does not exist. In fact the collected evidence indicates that title registration involves difficulties, expenses and personnel problems more troublesome and more irremediable than those encountered in recordation." What he proposes, still in italics, to remedy existing evils is repeal of the registration statute, "extensive remodelling"

---

27. POWELL, 287; GAGE, *op. cit. supra* note 13, at 134; Reeves, *supra* note 8, at 443.

28. *Ibid.* Additional citations to POWELL, 56, 269. See also GAGE, *op. cit. supra* note 13, at 134.

29. POWELL, 54. Add Hawaii and the Philippines. The latter "have made greater use of the system than any other part of the United States." *Id.* at 254.

30. (1916) 41 A. B. A. REP. 26, 428.

31. Proc. 25th Ann. Conference of Commissioners on Uniform State Laws (1915) 228; 9 UNIFORM LAWS ANNOTATED 217.

32. Beale, *loc. cit. supra* note 16; Rood, *loc. cit. supra* note 9; Wigmore (1912) 37 A. B. A. REP. 1148; Terry, President's Address, Proc. 25th Ann. Conference of the Commissioners on Uniform State Laws (1915) 101, 110; McCormick, *loc. cit. supra* note 11.

33. See note \*, *supra*.

34. *Id.* at 74.

35. *Ibid.*

of the recordation statutes, and state supervision of the rates for and exceptions in title insurance policies. To readers brought up in the faith of the Torrens system—a church to which Professor Powell once belonged<sup>36</sup>—all of this is subversive, regressive, and everything else horrible. How does Professor Powell reach such conclusions? What are his reasons and what his supporting evidence? Such unexpected pronouncements by so eminent an author about a problem of basic social significance deserve a detailed examination.

The chief danger Professor Powell thinks he sees in land title registration is in the difficulties of administration. He does not trust American public officials, whether clerks, registrars, or judges. Scattered throughout his book are expressions such as these:

“There is a substantial difference in both skill and efficiency between a staff of career governmental servants (such as exists in England) and the personnel encountered in the typical office of a county clerk or register of deeds in the United States.”<sup>37</sup>

“There is also an appreciable difference between the career man of high grade who heads such an office in British possessions or in Europe, and the successful politician who heads such an office in this country.”<sup>38</sup>

“The very great misfortunes which could result from unskillful judges, or, even worse, from venal judges cannot be overestimated.”<sup>39</sup>

“Because of the elective nature of the post as Registrar, the prime requisite of a candidate for that position is party allegiance. As the subordinates in the office are all appointees, their qualifications are of a similar nature. It is remarkable indeed that, despite such a set-up, the two highest positions have continued to be filled by men of so much merit.”<sup>40</sup>

By what evidence does Professor Powell support these sweeping fears of corruption and incompetence? Has he somewhere uncovered whole-

36. *Id.* at VII.

37. POWELL, 58.

38. *Ibid.*

39. *Id.* at 68. *Cf.* the insult by way of joke to New York lawyers at 177.

One point Professor Powell ignores is that these same judges must determine title controversies under the recordation system. With a concentration of business under the Torrens system, their skill should increase rather than decrease. Witness the testimony of the MASSACHUSETTS CONVEYANCERS ASS'N., THE LAND COURT OF MASSACHUSETTS (1936) 5, “The success in Massachusetts of the Land Court has been mainly due to the fact that its administration is in the hands of officials whose specialty is the law of real property and who are familiar with real estate dealings and who have the desire and will to make the Land Registration Act an efficient and helpful instrument for the benefit of the community.”

40. *Id.* at 164.



sale public fraud? On the contrary, his exhaustive researches disclose not a single trace of corruption in connection with title registration. Has he then some evidence of incompetence? Scarcely any outside of California, and that is questionable.<sup>41</sup> Here undoubtedly the best test is experience with the assurance funds, set up to protect the public from just such errors (and fraud) as Professor Powell fears. In Minnesota three counties—Hennepin (Minneapolis), Ramsey (St. Paul), and St. Louis (Duluth)—show during the last thirty-seven years “close to twelve thousand initial registrations and over two hundred thousand transactions involving the issuance of a certificate of title.”<sup>42</sup> In the first two of these counties no claims have ever been paid out of the assurance fund and in the third county only five small claims, averaging \$445.47.<sup>43</sup> In Cook County, Illinois, with over 21,000 original registrations and some forty years’ experience, the assurance fund on September 30, 1937 amounted to \$451,270.71.<sup>44</sup> In thirty-eight years (before September 1, 1936) total losses to this fund had amounted to only \$17,035.08, scarcely more than the present annual income of the fund.<sup>45</sup> Furthermore, all claims paid had “been approved by the county board, without a single instance of resort to court order.”<sup>46</sup> In Massachusetts, with 16,245 decrees of original registration, 136,589 certificates of title issued, and 449,496 documents registered, the assurance fund at the end of thirty-eight years totalled \$248,632.22. The only payments from it, amounting in all to \$2,300, had occurred early in the history of the system.<sup>48</sup> The Massachusetts Statute is unique in making no provision for recoveries for losses caused by errors in the initial registration. “It is a tribute to the administration of this law by the Land Court,” Professor Powell writes, “that no persons so cut off have publicly bewailed their uncompensated losses. It is not likely that many losses of this sort would have been passed over in silence.”<sup>49</sup> The fact is that Professor Powell’s studies force him to summarize:

“In all other areas (excepting California and one County of Nebraska) the funds have grown slowly but steadily and the amounts expended in the settlement of claims have been relatively small. Careful administration of the law has seemed effective to make frequent claims against the fund unlikely.”<sup>50</sup>

---

41. Some of the blame could be passed to lawyers and a defective statute.

42. POWELL, 207.

43. *Id.* at 223.

44. *Id.* at 143.

45. *Id.* at 161.

46. *Id.* at 162.

47. *Id.* at 180, 181 n. 47.

48. *Id.* at 195.

49. *Id.* at 194 n. 71.

50. *Id.* at 72. To the unbiased, these findings should suggest that the opportunities for error are not nearly so great as the opponents of title registration urge. Often the

Does all this indicate corrupt and incompetent personnel? Why must Professor Powell in his studies of Illinois, Massachusetts, and Minnesota end up with both generous praise for the past operation of title registration and gratuitous, dire forebodings of the future?

Next, let us assume that the personnel for public office in this country is as poor as Professor Powell would make it. Does he escape his terrors? The remedy for admitted, existing evils which he proposes, as an alternative to title registration, is a more general mounting of publicly "regulated," but privately controlled, title insurance upon the existing public recordation system. This involves no comparable problems in personnel? Can it be that public officials who cannot be trusted to copy into a register the essential portions of a mortgage or a deed are yet competent to supervise in intricate detail the operations of private title companies? Such is a strange suggestion during these days in which doubts are rife about the general adequacy of state supervision of insurance of all other kinds. Yet the query cuts deeper. Must not any super-imposition of title insurance upon the existing public recordation system leave title insurance dependent still upon the integrity and ability of public officials in public recording offices? Clearly Professor Powell seeks in vain to escape reliance upon public servants; what he could, and should seek to escape is the outmoded system of bookkeeping by which these servants are enmeshed. More captious critics could even raise questions about the personnel of the private title companies. Professor Powell, citing a Minnesota lawyer, objects to placing "the owners of real property completely at the mercy" of political appointees.<sup>51</sup> Yet owners of property do have some control, however little, over political appointees. How much control do they have over the appointees of a private title company which enjoys, as many such companies do, a "natural" monopoly? And can it be that the abhorred principle of "rewarding the faithful" does not operate in private companies?

---

complaint is made that registrars are incompetent to pass upon the "validity" of a deed. Yet here the Torrens statute may offer a good prophylactic measure; the registrar can check up on defective formalities before any damage is done. Most of the numerous decisions (under the recordation system) about defective formalities strike the uninitiated as silly anyhow. A clear expression of intention and an adequate description of the property should suffice. With its tract indexes, the Torrens system aids in securing the latter; surrender of the owner's certificate is additional evidence of the former.

On transfers of less than the fee, the registrar does not, as Professor Powell suggests, enter a notation of "*the legal effect* of the document filed." All he does is to note the more salient items of the document. In so far as these notations go, a subsequent purchaser can rely on them; in so far as they are obviously incomplete, the purchaser must go to the original documents. Both the infrequent claims against assurance funds and the comparative lack of litigation about misleading memorials attest the chimerical character of the danger here alleged.

On transfers of the fee, the issuance of new certificates requires, of course, accurate copying. So does most of the work in a "recordation" office.

51. POWELL, 224.

The most difficult task confronting Professor Powell, and the task which he assays with least success, is that of making foreign experience irrelevant. Why if the Torrens system operates so well in all of the many countries recited above can it not be made to operate equally well in this country? Professor Powell offers too many reasons to carry conviction. Six factors drive him to the conclusion that the "experiences of those geographical areas (British Empire, Europe and the Philippines) have little or no relevance" to problems here, especially in New York.<sup>52</sup> The first, and "most widely pervasive," of these factors is "the wide gulf between the governing body and the governed" which exists abroad. Dictators can be efficient, tell their subjects what is good for them, and impose an improved system of land transfer.<sup>53</sup> With all patience, we ask: can this be taken as serious argument? Note the concession that title registration is the more efficient system. We are to be denied its benefits merely because we do not have dictatorial techniques for securing its public acceptance. It is barely possible, too, that our English, Canadian, and Australian cousins may not yet enjoy being classed among the subjects of the dictators. The second factor, also "widely pervasive," is that in some of the foreign areas title registration was able to begin with "a relatively clean sheet." There were no recordation systems to displace, no "'vested interests' of office holders, of lawyers, of abstract companies or of title insurance companies" to disturb.<sup>54</sup> This, however, applies to only a small part of the area where title registration is in vogue. Elsewhere in his book Professor Powell refers to the strong prejudice of solicitors and others against a new and encroaching system.<sup>55</sup> Further, to a reform otherwise desirable, can it be a persuasive objection, an objection worthy of a scholar's espousal, that vested interests oppose it?

The third factor springs from the constitutional requirements, unique in this country, of due process and separation of powers. These are thought by Professor Powell to confine initial registration to a judicial proceeding, to an action to quiet title, with its "notices, service by publication, elapses of time, court appearances, preparation and entry of court

---

52. *Id.* at 56.

53. "When such a gulf exists, the governing body can be dictatorial, and can effectively tell the subjects what is good for them and can see that they accept it. Herein lies the possibility of the greater efficiency of a dictatorship over the looser organization of a democracy. Often what is thus imposed is good, but the fact remains, that its acceptance was largely involuntary. There can be no denial that this factor has been present in large measure in the English administration of Australia, New Zealand, Tasmania, Papua, Fiji, and in the crown colonies and protectorates of the Empire. The present events in Germany and Austria testify to the long willingness of the peoples in those countries to accept, even to seek, domination from above. They are nations composed of people accustomed to efficiency, accustomed to doing what a small governing group assures them will be good for them." *Ibid.*

54. *Id.* at 57.

55. *Id.* at 280.

orders" and other delays.<sup>56</sup> This is an objection which goes only to the cost of, and the amount of time required for, the shift from the old system to the new. The advantages of the new system might more than repay for such cost and delay. Furthermore, the cost of such a proceeding may not be inescapable. It is possible that initial registration could be accomplished, as in some cases in Great Britain, by the registration of a "possessory" title, requiring an immediate, but only a clerical, change in the keeping of the public books about the unit of land in question, plus a further provision that title is not to become absolute until the lapse of a reasonable period of time fixed by a statute of limitations.<sup>57</sup> What could be unconstitutional in that?<sup>58</sup> Only where registration is contested, would resort to judicial proceedings be necessary.<sup>59</sup> The fourth factor is the alleged difference between European and American public officials in skill and honesty.<sup>60</sup> Of which, enough above. The fifth "important" factor is that foreigners, even the English, are easily satisfied with a certificate of title more inconclusive than Americans would accept.<sup>61</sup> By what evidence? How long have we put up with the recordation system with all of its utter inconclusiveness? How conclusive is the title insurance which Professor Powell advocates? It carries all the infirmities of the recordation system plus its own exceptions and qualifications. In England about 750,000 titles, of an aggregate value of about \$2,600,000,000, are registered under the Torrens system. Losses to the assurance fund have totalled about \$5,500.<sup>62</sup>

For his sixth and final factor, distinguishing foreign experience, Professor Powell retreats into the general complexities of the American land law. Our substantive law of real property is made much more complicated than that of England or Germany.<sup>63</sup> One paragraph from a students' hornbook demonstrates that in England, since the Property Act of 1925, there must always be one person, or a small group of persons, who can convey the fee simple absolute.<sup>64</sup> From his "own knowledge," after consulting certain uncited "authorities upon comparative law," Professor Powell announces "the almost complete absence on the Continent of the Anglo-American division of ownership into present and future interests, and into legal and equitable interests. . . ." <sup>65</sup> Not until we make "the

---

56. *Id.* at 58.

57. For the English practice see *id.* at 276.

58. For full discussion see Comment (1939) 48 YALE L. J. 1238.

59. In Minnesota, it appears, "about 99% of the initial registrations are uncontested." POWELL, 216 n. 68.

60. POWELL, 58.

61. *Id.* at 59.

62. *Id.* at 282, 285.

63. *Id.* at 59.

64. *Id.* at 281 n. 42. The book cited is CHESHIRE, MODERN REAL PROPERTY (1933).

65. *Id.* at 292.

changes in our underlying law of property which England made in 1925" can we hope to simplify land transfers; until then the English experience since 1925, and presumably the German experience, must be "completely" eliminated.<sup>66</sup> To this there are several answers. Professor Powell both underestimates and overestimates. He underestimates the complexities of existing English and German land law. The "fee simple absolute" which one person, or a small group of persons, can always convey in England is far from an "unincumbered" fee; purchasers must still be concerned with easements, covenants, land contracts, mortgages, leases and so forth, and the mechanics for overriding future interests are not simple.<sup>67</sup> Likewise, the Germans, though they use different names, have very much the same kind of future and other interests that we have; if any comparison is possible, their land law appears to be even more complex than our own.<sup>68</sup> Next in a most important sense Professor Powell overestimates the complexity of our American land law. How much of the land in this country is actually held subject to future interests of any kind?<sup>69</sup> By what percentage of the population?<sup>70</sup> How much of the land so held is not held in trust by trustees with power to convey? How often is it that even a legal life tenant cannot, with the assistance of a court order, convey free of encumbering future interests?<sup>71</sup> There can

---

66. *Id.* at 69.

67. Schnebly, "Legal" and "Equitable" Interests in Land under the English Legislation of 1925 (1926) 40 HARV. L. REV. 248; POTTER, REGISTERED LAND CONVEYANCING (1934) 1, 36, 267. See also Bordwell, *Registration of Title to Land* (1927) 12 IOWA L. REV. 114. "A favorite argument of the solicitors and of others has been that the difficulties a purchaser of land meets in obtaining an easy, certain, and quick title are the fault of the general law of property and that if these faults were removed there would be no need for a public registry."

68. Rheinstejn, *Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems* (1936) 3 U. OF CHI. L. REV. 624-35; FORBES-CUE-BRICKDALE, METHODS OF LAND TRANSFER (1914) 129. The latter, after extensive study, paints a glowing picture of the complexities of German land law and finds no difficulties in registration.

69. "While we do, of course, constantly meet with future interests in our everyday practice of law, yet they are relatively infrequent in the grand total of real estate transactions. It is safe to assert from observation and experience, without exact statistics, that a small percentage of the land in this country is affected with future interests in the nature of reversions and remainders. In England, on the other hand, where the strict settlement is customary, it is probably true that the greater portion of the land is held in this sort of divided ownership. This prevalence of indestructible future interests has there become a serious problem, because they restrict alienation of the land and complicate conveyancing." Schnebly, *supra* note 67, at 249.

70. "Thus the law of future interests is likely to find application in the dispositions made by only 4.15% of our population, but this select group have at their disposal, once every generation, upwards of 65% of the total capital wealth of the country." POWELL, CASES ON FUTURE INTERESTS (2d ed. 1937) 2 n. 3.

71. Note the recent statutory improvements in New York. N. Y. REAL PROP. LAW § 107-a n. LEGIS. (1938) 37 COL. L. REV. 1238.

be but one answer to these questions: factually, the fetters of family dynasties hinder the liquidity of land but little in this country.<sup>72</sup> Finally, let us assume that Professor Powell is right about the comparative complexities of foreign and American land law. What difference does it make? The mechanics of registration offer no insuperable obstacle to the handling of complicated future interests.<sup>73</sup> Registration can be made in the name of the life tenant or owner of the possessory estate and memorials entered upon the register and certificate indicating that the land is held subject to certain future interests which an intending purchaser can ascertain by looking at the filed documents creating such interests. It is true that such land may not be completely alienable. But why should we not secure such limited alienability as is possible? Non-liquidity because of outstanding future interests must seek its own justification; non-liquidity because of the disorder in which the public books are kept has no justification, unless to afford opportunity for the imposition of private tolls. Why must conveyancing reforms await the simplification of the substantive law of real property?

To bolster his unpersuasive fears about the difficulties of administration, Professor Powell has only certain dubious statistics on the comparative costs of registration and title insurance. Why dubious? Because certain tables from which summary conclusions are drawn are weighted in a way unfair to Torrens transactions, because of over-emphasis on the high costs of *initial* registration and under-emphasis on the low costs of *subsequent* transfers, because of inadequate and misleading comparisons of costs to the public, and finally because all of these computations really seek to compare what are in fact non-comparables.

First, the mis-weighted tables. One of the principal reasons advanced by Professor Powell for changing his church is the alleged excessive cost of initial registration in New York City. From a comparison of two of his charts, No. 5<sup>74</sup> and No. 10,<sup>75</sup> he concludes "that the cost of an initial registration is approximately twice the cost of an original policy of title insurance. . . ."<sup>76</sup> Examination of these charts reveals a curious discrepancy. Chart No. 10 on the costs of initial registration includes not only the required statutory fees but also survey costs and a lawyer's fee; in contrast, Chart No. 5 on the costs of title insurance includes only the examination and insurance fees, omitting survey costs

72. Or would hinder it but little if we had an efficient system of land transfer.

73. Cf. Sabel, *Suggestions for Amending the Torrens Act* (1936) 13 N. Y. U. L. Q. REV. 244, 253. In fact it is precisely when there are future and other multiple interests that registration is most obviously superior to recordation. Under registration it is easier both to keep track of and to protect such interests.

74. POWELL, 41.

75. *Id.* at 49.

76. *Id.* at 49.

and lawyers' fees. Yet in footnotes, too obviously amended,<sup>77</sup> Professor Powell agrees that both a survey and legal services are essential to a closing with title insurance. Why should not an author who amends his footnotes also amend his tables and his conclusions? Let us make the emendations for him. The easiest and fairest way to do this is to remove from Chart No. 10, on the costs of initial registration, the items added for charges common to both systems of transfer. This deletion accomplished, we get the following interesting comparisons:

Assessed valuation:	5,000	10,000	20,000	50,000	100,000
Title insurance costs:					
(Manhattan and Bronx)	105.00	135.00	195.00	340.00	465.00
Torrens costs:					
(initial registration)	104.27	114.27	134.27	194.27	294.27
Advantage to Torrens:	00.73	20.73	60.73	145.73	170.73

For survey costs and attorneys' fees Professor Powell had added to the costs of initial registration the following amounts:<sup>78</sup>

Assessed valuation:	5,000	10,000	20,000	50,000	100,000
Survey:	25.00	25.00	25.00	25.00	35.00
Lawyer:	75.00	120.00	240.00	420.00	570.00

Can it be assumed that amounts very much smaller would suffice for closings with title insurance? Whatever the assumption, it should not be overlooked that for valuations above \$5,000 title registration begins with a substantial advantage.<sup>79</sup>

Scarcely more convincing, despite Professor Powell's sweeping generalizations,<sup>80</sup> are similar comparisons for jurisdictions other than New York. Opponents of title registration can get scant comfort from Cook County, Illinois, which boasts the lowest costs in the United States for a practicable, initial registration. There the registrar's office, to avoid wasting "time and energy instructing some intermediary unfamiliar with

77. *Id.* at 46 n. 146a, 49 n. 149, 50 n. 149a. Note the "a" numbering.

78. *Id.* at 49, Chart 10. Questions could be raised about the reliability of Chart No. 9 [POWELL, 48] from which Professor Powell draws his estimate of attorneys' fees for title registration. Are the 12 cases selected representative? Are the recollections of the lawyers relied on in 5 of the cases dependable? Should the case which also included "an incidental ejectment action" have been included? Even Professor Powell admits that his table "affords a very inadequate basis for generalization." Chart No. 5. Supplement F. (Massachusetts) carries but little greater persuasion.

79. A somewhat better case on comparative costs could be made for title insurance if "reissue" rather than "original" rates were used. Yet this is offset to some extent by an extra charge of one-half the reissue fee "when an ownership and mortgage thereon are simultaneously insured." (Quoted words are from POWELL, 41). So also a better case could be made for the Torrens system if, as is indicated in the text, the costs of subsequent transfers rather than of initial registration were used.

80. *Id.* at 63-65.

the procedure," advertises itself as ready and willing to conduct the proceeding for an applicant.<sup>81</sup> Excluding the cost of an abstract, said to be necessary to both title insurance and title registration, Professor Powell comes out with the following summary comparison of costs:<sup>82</sup>

<i>Value of Property</i>	<i>Policy of Title Insurance</i>	<i>Initial Registration if No Agent Used</i>	<i>Initial Registration if Agent Is Used</i>
\$1,000	\$30.00	\$21.70	\$52.79
3,000	42.00	33.70	64.79
5,000	54.00	35.70	66.79
10,000	84.00	40.70	71.79

Again, no figures are offered for attorneys' fees when the closing is by way of title insurance. For Massachusetts the figures are, on the surface, considerably less favorable to initial title registration. Chart No. 6, Supplement F,<sup>83</sup> indicates the excess cost of title registration over the "attorney system" to be \$102.96 for land of assessed valuation of \$5,000, \$176.11 for \$10,000, \$322.41 for \$20,000, and \$534.81 for \$50,000. Yet of what value is a comparison of the cost of the security of title registration with that of the insecurities of the attorney system? For Minnesota it is the same old story. By loading the costs of initial registration with attorneys' fees while omitting such fees from the costs of title insurance, Professor Powell comes out again with a summary comparison which is, in the lower valuations at least, distinctly unfavorable to title registration.<sup>84</sup> Why is it, if his repeated summaries be correct, that new registrations continue to be made, despite the opposition of lawyers and title companies, in Chicago, Massachusetts, and Minnesota? In such communities high costs are apparently material only in delaying the eventual supersession of the recordation system.

Proponents of the Torrens system have long admitted that the costs of initial registration are too high adequately to encourage voluntary entry into the system. What they urge is that the low cost of *subsequent* transfers more than makes up for the high cost of entry.<sup>85</sup> Here Professor

81. *Id.* at 154.

82. *Id.* at 159.

83. *Id.* at 191.

84. *Id.* at 219.

85. "It seems contrary to common sense that the methods most widely used in proving titles are those very methods under which *minimum* average costs range well above *maximum* average costs under the less well known but potentially as efficient system of land registration."

"The *highest* average total title cost per thousand dollars of loan under the Torrens system is \$10.38 in Minnesota. The *minimum* average total cost per thousand dollars of loan under any of the other three systems is \$9.42. This minimum of \$9.42 per thousand dollars of loan, is attained in Massachusetts when the entire examination of title and the preparation of an opinion is entrusted to an attorney. The average cost per thousand dollars of a Torrens title in Massachusetts is \$6.02—less than two-thirds of this mini-



Powell is noticeably reticent. "No definite data as to the cost of a subsequent sale or mortgage of registered land," he writes,<sup>86</sup> "is available for New York." Why not? Chart No. 3<sup>87</sup> indicates a large number of such transactions within recent years. It should have been as easy to obtain the figures for these as for the original registrations for which Professor Powell went as far back as 1922. For his italicized summary that a subsequent sale or mortgage of registered land costs between one-half and three-quarters of what a transfer would cost under competing methods, Professor Powell is content to rely largely upon the figures of an earlier study by the Sub-Committee on Law and Legislation of the Central Housing Committee of the Federal Government. For its study this committee selected at random eighty-five hundred loans made by the Home Owners' Loan Corporation in ten states.<sup>88</sup> It found that the average total title costs per thousand dollars of loan ranged in these ten states as follows:<sup>89</sup>

Abstract and attorney	\$10.82 — \$19.55
Attorney	9.42 — 19.24
Title company	10.78 — 19.89
Land title registration	6.02 — 10.38

Three of the states studied were Illinois, Massachusetts, and Minnesota. For these three states comparative costs per thousand dollars of loan were: for Illinois, abstract plus attorney \$19.55, title company \$15.93, Torrens \$8.26; for Massachusetts, attorney \$9.42, Torrens \$6.02; for Minnesota, abstract plus attorney \$15.56, Torrens \$10.38.<sup>90</sup> Favorable as these figures are to title registration, they are not as favorable as might have been expected. The only statutory fees for the transfer of registered land are negligible (in New York, \$5; in Illinois, \$3 plus \$1 for tax search).<sup>91</sup> Whence comes the extra cost? Gone is the laborious, expensive title search. Questions of interpretation are reduced to a minimum; and attorney has to look only at the entries on the register, and not at an unending chain. Some light can be gained from the testimony of one of Professor Powell's Massachusetts lawyers. This lawyer states that "the average time expended by a lawyer in ascertaining the state of the title of non-registered land would be a day and a half, whereas

num." *Costs of Title Examination and Proof* (1938) 4 FED. HOME LOAN BANK REV. 112, 117.

86. *Id.* at 50.

87. *Id.* at 39.

88. See discussion in Russell and Bridewell, *Land Title Examination: An Appraisal* (1938) 14 J. LAND & PUB. UTIL. ECON. 133.

89. *Id.* at 138.

90. POWELL, 52; *Cf. Costs of Title Examination and Proof* (1938) 4 FED. HOME LOAN BANK REV. 112.

91. POWELL, 50, 159.

the comparable average required to ascertain the state of a registered title would be not more than one or two hours;" yet, he continues, since the public does not know "the different amount of work taken in the two types of deals," he "and most other lawyers" charge "the same for handling the sale or mortgage of registered land as for the sale or mortgage of non-registered land."<sup>92</sup> Were attorneys' fees properly reduced and items common to all the systems of transfer removed from the figures of the government committee, further comparison would undoubtedly be even more favorable to title registration. Professor Powell seeks to minimize this by a beautiful irrelevancy. The costs of *initial* registration and of subsequent transfers do not, he asserts, impinge upon the same pocketbooks; present owners or purchasers are not likely to be concerned about "longtime saving" to future owners or purchasers.<sup>93</sup> First, is it true that initial registration brings no financial benefit to the registrant? How much of the land in this country is subject to mortgage? To mortgages continually renewable, with title search attendant upon each renewal? Further, even Professor Powell is forced to find, in a footnote excursion, certain other immediate increments in value from registration, increments reflected by the certainty of freedom from future trouble and by the anticipation of lower costs on all future transfers.<sup>94</sup> Finally, even if founded in fact, Professor Powell's objection springs from a social vision most limited. Why should not the social cost—the cost to the general public—of all this parasitic, repetitious, unproductive activity be eliminated?

It is in his considerations of social cost that the deficiencies of Professor Powell's analyses are most notable. Whether we own or rent or just live with somebody else, we all pay daily, in one form or another, for the high costs of land transfer. Yet in his discussions of title registration Professor Powell shows great concern over possible public subsidies. For Illinois he makes valiant efforts to determine exactly how much the public subsidy is.<sup>95</sup> He is worried because costs to the landowner are minimized at the expense of the taxpayer, because "the Statute fixes fees utterly disproportionate to the services rendered."<sup>96</sup> Why no similar concern about our indubitable subsidies to the title companies? There are, after all, subsidies and subsidies; nor is monopolistic privilege the least significant.<sup>97</sup> Indeed our whole public recordation system is in a sense just a subsidy to the private title companies in the many communities in which no title is of value without their sanctification. Further-

---

92. *Id.* at 192.

93. *Id.* at 69, 190.

94. *Id.* at 190.

95. *Id.* at 156-158.

96. *Id.* at 156.

97. *Cf.* Bohlen, *Aviation Under the Common Law* (1934) 48 HARV. L. REV. 216, 218.

more, the cost of this particular subsidy—of our maintenance of an inefficient and incomplete recordation system—must continue to grow. Though the supply of land does not increase, the number of land transactions does. Note again the continued subdivision of areas, the acceleration of transfers, the multiplication of records, and all the attendant travail. Yet these constantly expanding, tumescent, public burdens are scarcely the beginning of the total cost to the public. To them must be added the sum of the private tolls or taxes collected on every transfer or mortgage by title companies or title lawyers. Our lethargic and gullible public is forced to support two systems—a “duplicating” system, public and private. The private title plants of the companies and lawyers are in truth but little more than miniature, defective adaptations of one of the Torrens ideas.<sup>98</sup> Though they duplicate the public records, they are today indispensable both because their books are in better order and because they contain curative evidence not disclosed in the public records. Still the question must be faced: why should the public be forced indefinitely to support both systems? It passes understanding to suppose that private enterprise is so much more efficient than public that the whole double burden is irrelevant; especially when all the infirmities of the public system are carried over to increase the cost of the private.<sup>99</sup> Yet Professor Powell would even add to these costs. To the existing creaking and cumbrous, public and private, machinery he proposes to add a new and more effective state supervision of title insurance. How much will this, if effective, add to public burdens? How much to individual costs, ultimately also public burdens? With these mounting, triplicative costs—costs of recordation, of title insurance, and of safeguarding title insurance—now contrast the public savings which could be effected by a universal adoption of the Torrens system with its excision of the cancerous defects of recordation—*careat emptor*, its elimination of wasteful searches, its improved methods of mortgage foreclosure<sup>100</sup> and tax sale,<sup>101</sup> and its great potentialities of a general decrease in land litigation.<sup>102</sup>

Implicit in much of the criticism above has been a comparison which Professor Powell seldom makes. More important than comparative *cost* is comparative *protection*. What Professor Powell ignores throughout his minute comparisons is the difference between what a purchaser gets under the Torrens system and under competing methods of transfer. In

98. The tract index idea. See HOPPER and FAIRCHILD, *op. cit. supra* note 7, at 12.

99. If private monopolies are so much more efficient than public, why not turn over to them the entire business of collecting and keeping land records?

100. Fairchild, *Foreclosure Methods and Costs: A Reevaluation* (1937) 7 BROOKLYN L. REV. 1.

101. Fairchild, *Tax Titles in New York State* (1938) 8 BROOKLYN L. REV. 61.

102. Swartzel, *Torrens Title Registration Lessens Litigation* (1922) 19 OHIO L. BULL. AND REP. (N.S.) 679.

fact, he more than ignores; he obfuscates. The prime virtue of the Torrens system he parades as defect: the greatest defect of title insurance he parades as virtue. His complaint is that under title registration the effect of an official error is "to take away a right in land and to substitute therefor a right to money compensation."<sup>103</sup> Translated, all this means is that a bona fide purchaser of registered land is protected against people who have slept on their rights; the latter are remitted, if deserving, to an assurance fund. What complete protection to bona fide purchasers an adequate Torrens statute offers, Professor Powell elsewhere thoroughly demonstrates. "The cumulative effect of these five cases," he writes in his study of New York,<sup>104</sup> "leaves little doubt that the courts of this State are definitely committed to the high conclusiveness of the certificate." Similar conclusions are reached for Illinois and Massachusetts.<sup>105</sup> Emphatic confirmation for New York is offered by another writer, an official examiner of titles: "A title that is now registered in this State is one that is indefeasible and stands against anyone in the world. It just simply cannot be upset, nor the owner of the title ousted from his possession."<sup>106</sup> Can anything comparable be offered by any of the competing systems? Certainly not by either the *attorney system* or the *abstract and attorney system*. Here the purchaser gets only the opinion of his counsel; the perils of negligence, of honest mistake, of incompetence, and of insolvency are obvious and well documented in the reports.<sup>107</sup> What of title insurance? Here clearly in case of error, even if the insured can charge the insurer upon the terms of the policy, he still loses the land. In the words of Professor Powell's encomium, "the effect of these errors (of title companies) is to leave the interest in land wherever it was and to provide a source of compensation for the person insured who never obtained what he thought he was getting."<sup>108</sup> It is *caveat emptor* versus negotiability; and in the light of modern commercial developments Professor Powell is scarcely on the side of the angels.<sup>109</sup> Lingering residues of sentiment for family settlements cannot long keep land the only *res extra commercium*. Furthermore, tapping the source of compensation in title insurance is not the simple matter which Professor Powell's sentence might suggest. Policies, still in the "experimental" stage,<sup>110</sup> are often full of exceptions, reservations, and conditions; seldom do they insure "marketability" of title.<sup>111</sup> To this add the difficulties of

---

103. POWELL, 67.

104. *Id.* at 33.

105. *Id.* at 143, 178, 33 n. 118.

106. McGill, *New York's Land Title Registration Law* (1931) 17 A. B. A. J. 689.

107. Laddey, *The Torrens System of Land Registration* (1931) 54 N. J. L. J. 42.

108. POWELL, 67.

109. *Cf.* Terry, *supra* note 32, at 111.

110. RHODES, *THE CONTRACT OF TITLE INSURANCE* (1936) 7.

111. GAGE, *op. cit.* *supra* note 13, at 99, 101.

giving proper notice and proving loss, the delays during litigation between the insurer and adverse claimants, the limitations on the amount of recovery and occasional onerous subrogation clauses, and the prohibitions against assignment.<sup>112</sup> Some of these hazards might, it is true, be eliminated by adequate state supervision. But at what price? Could costs to the individual insured be kept down to even their present high levels once the title companies really began to insure? How much would such reforms increase the difficulties of getting any insurance at all? Even now a purchaser may have to bring an action to quiet title and buy up all kinds of dubious claims before a title company will lend him its mantle.<sup>113</sup> In any event, why should all the hazards and infirmities of the recordation system be preserved simply to create an opportunity for guarding against them? Patently the "product" of the Torrens system — "repeatedly available after one principal fee"<sup>114</sup> — is superior beyond comparison to that of any of the other systems.

No less important than cost or security, if land is to be made a liquid, emergency asset, is the time required to determine whether a title is marketable. Here again, by eliminating the search and the need for interpreting an endless chain of documents, the Torrens system would appear to have a definite advantage. Proponents of the system assert that in the absence of memorials of unusual complexity the status of a title can be ascertained within only a few minutes. It should not have been difficult to test this claim either by examining a number of recent transfers of registered land or by an independent sampling of a number of register pages. Yet without investigating any actual cases Professor Powell boldly belittles "the common belief in the rapidity with which a sale or mortgage of registered land can be made."<sup>115</sup> In his brief discussion he drags in *initial* registration and generously concedes that this can be accomplished in about three months.<sup>116</sup> His studies show a "normal duration" in Illinois of from two to three months, an average in Massachusetts of 114 days, and an average in Minnesota of 119 days. The shortest time encountered for a single proceeding in Illinois was 42 days, in Massachusetts 36, and in Minnesota 56.<sup>117</sup> Of course if initial registration is to be restricted to a judicial proceeding, an action to quiet title, it cannot be accomplished overnight, even if uncontested. But initial registration is required only once; the three months must eventually elapse. The really important consideration is: how long does it take to determine the title to land already registered? For his answer Professor Powell

---

112. For full discussion see *id.* at 90, 103, 116.

113. Swartzel, *loc. cit. supra* note 102.

114. Viele, *supra* note 7, at 434.

115. POWELL, 53.

116. *Id.* at 70.

117. *Ibid.*

relies once more upon the study of the Sub-Committee on Law and Legislation of the Central Housing Committee. This study shows that, for "the *closing* of loans,"<sup>118</sup> in Massachusetts "the 'attorney-method' took 19.2 days, the 'Torrens method' 16.5 days" and that in Minnesota "the 'abstract method' took 51.4 days, the 'Torrens method' 46.1 days." Hence Professor Powell concludes that "sales and mortgages of registered land" require only "a trifle less time for completion" than similar deals in unregistered land, "the rapidity of such transactions is not appreciably greater."<sup>119</sup> How so? What showing is there of a request for speed in the H.O.L.C. cases? Granting a request for haste, are the samples adequate to overcome the "common belief" and the assertions of the Torrens proponents? Furthermore, the H.O.L.C. figures are not strictly to the point. For the purpose of comparing competing methods of transfer, the question is not how rapidly a sale or mortgage can be effectuated, how soon the parties can get together on terms and get the papers drawn, but how soon the "status" of the title offered can be definitely and safely ascertained, how soon it can be determined whether the prospective vendor or mortgagor really has what he says he has. On this, the important point, the H.O.L.C. study offers little help; Professor Powell, none. The claims of the Torrens proponents stand un rebutted, if not implemented.

For a final heroic effort Professor Powell makes much of the fact that in this country title registration has been but little used even in the states which have enacted statutes. Such non-use he interprets as "disinclination." Putting together his figures from the six American jurisdictions in which the system has been most used, he finds during "a period of nearly forty years" an aggregate registration of only about 70,000 parcels of land, "almost exactly one-tenth of the number of parcels which have been registered in England alone, and considerably less than the number registered in any one of several of the provinces of Australia."<sup>120</sup> "These figures demonstrate," he concludes in the customary italics,<sup>121</sup> "that persons handling land transactions throughout this country have not regarded title registration as sufficiently attractive or meritorious to cause them to register their titles." Passing quickly over the fourteen states which have, or have had, some kind of a Torrens statute, though few or no registrations, he summarizes: "As to them the sole fact which stands out is 'disinclination' to utilize this system."<sup>122</sup> Indeed, such registrations as have occurred anywhere in this country he ascribes to "specialized facts not present as to most land ownerships," facts requiring either "a useful device for the clearing up of a bad title" or unusual

---

118. Italics ours.

119. POWELL, 70.

120. *Id.* at 61.

121. *Id.* at 62.

122. *Id.* at 55.

"protection against the dangers of adverse possession" as in "the timber lands of North Carolina, the wild lands of Georgia, and the undeveloped mineral lands of Minnesota" or "a device for the giving of a relatively inexpensive evidence of title" to purchasers, as in suburban residential developments!<sup>123</sup>

Now comes the crucial question how to account for all this "disinclination." Here Professor Powell's contribution is a faltering dichotomy which ignores what everybody knows. "It might be due," he writes,<sup>124</sup> "to a failure to appreciate the available blessings of a good innovation. On the other hand it might be due to an awareness of the demerits of the available procedure." So simple as that! Clearly each of these alternatives assumes, whatever the "blessings" or "demerits" of the Torrens system, a public adequately informed. It merely does not choose to register. By what wisdom does Professor Powell exclude ignorance and, more important, misrepresentation? There is no need to whisper it. It is common knowledge among lawyers and real estate men from New York to Chicago to Los Angeles and back again. The literature is full of references to it.<sup>125</sup> The chief, major, proximate, and direct cause of the non-use of, or of the public "disinclination" to use, the Torrens system has been the bitter, multi-form opposition — lobbying against any reform, wounding statutes when enactment is inevitable, conspiring with lending agencies, spreading adverse publicity, and so forth — of title companies and title lawyers.<sup>126</sup> Yet of this bitter opposition one catches

123. *Id.* at 62.

124. *Id.* at 55.

125. "Every act passed in the United States bears on its face the scars of desperate conflict. It is doubtful whether any legislation has ever been assailed with more bitterness or greater persistency than this; and unfortunately its antagonists have generally succeeded in marring the act even when they have been unable to defeat it." Report of the Committee on the Torrens System and Registration of Title to Land, Proc. 24th Ann. Conference of the Commissioners on Uniform State Laws (1914) 229. "In almost every important city of the country . . . a man could not get a *usable* title to land, or a mortgage on it, unless he had his title insured by one of the title companies, which were, as we have seen, interlocked with the savings banks, insurance companies, large estates, and other lending institutions." ARON, *THE MORTGAGE PROBLEM* (1934) 287. "If you turn over a stone in the field, a lot of crooked wriggling creatures are distressed by being exposed to the light and deprived of their shelter. If you try to correct an old vice you find the same situation; and the recording system is no exception." Reed, *supra* note 9, at 380.

For further elaboration see, *inter alia*, BARKER, *THE TORRENS LAW—AN ARGUMENT FOR IT* (1937) 14; Fairchild and Gluck, *Various Aspects of Compulsory Land Title Registration* (1938) 15 N. Y. U. L. Q. 545, 546; McCall, *The Torrens System—After Thirty-five Years* (1932) 10 N. C. L. REV. 329, 347, 349; McKenna, *STATE INSURANCE OF LAND TITLES* (1925) 80; Smith, *The Insurance of Titles to Property* (1932) 8 J. OF LAND & PUB. UTIL. ECON. 337; TORRENS, *ESSAY ON THE TRANSFER OF LAND BY REGISTRATION* (1882) 44; Wigmore, *supra* note 32, at 1150.

126. These lawyers forget that the present generation of title searchers would find employment in effecting the shift from recordation to registration; the next generation could be trained to do something else.

but an occasional glimpse in Professor Powell's book. In an afterthought footnote he admits that in "the metropolitan area the entrenched position of the title insurance companies for many years prevented any real consideration of the possible merits of title registration;" yet he carefully warns against hasty conclusions: "The admittedly selfish opposition to title registration which characterized the activities of the officers of title insurance companies does not establish the merits of title registration."<sup>127</sup> In another footnote he mentions, "as an added incentive to the drift away from title registration," the ten per cent "kickback" which one prominent metropolitan title company gives to "the attorney or realtor who handles the matter requiring their services."<sup>128</sup> Elsewhere in the text appear brief references to the delight of the title companies in litigation about Torrens problems.<sup>129</sup> But nowhere in this "impartial examination of the facts" does there appear any evidence of a careful investigation of the vigorous charges of previous commentators. Why could not Professor Powell have accepted as a fact the reason for his labors — the comparative non-use of the Torrens system in New York and elsewhere in this country — and have given us, instead of dozens of pages of trivial data about non-use, some usable confirmation or refutation of these common charges? Even the "facts" relevant to an "impartial" investigation call for some selection. What so many people have so long emphasized as the generating source of public "disinclination" would seem to be a "fact" of more than passing importance. Somebody should tell Professor Powell that the "persons handling land transactions throughout this country" have not, as the terms of his summaries suggest, been chiefly interested in meritoriousness. Their urge has been more primal.

It is the utterly unjustifiable, unrealistic defeatism in Professor Powell's book which is most depressing. Registration should not be made compulsory; it should not even be left voluntary; no improvements can "reasonably be made"; the statute should be wiped completely from the books; our only hope lies in an "extensive remodelling" of recordation and a better policing of title insurance.<sup>130</sup> So runs his sad, but unconvincing, refrain. Let us now pass over his self-inflicted fears about the difficulties of administration, his misleading comparisons of cost to the individual,

---

127. POWELL, 37 n. 128a.

128. *Id.* at 162 n. 156.

129. *Id.* at 24, 99. Note also the bow to "vested interests" in the effort to distinguish foreign experience. *Id.* at 57.

130. *Id.* at 74. Cf. Rood, *supra* note 9, at 387. "It is a terrible indictment of our boasted jurisprudence if it is incapable of inventing or enduring any improvement on the system which has enabled title guaranty companies and abstract companies all over our land, and often several in the same city, to put by millions in surplus, after paying immense dividends, salaries, and clerical expenses, all extorted as a tax on land titles and transfers, for what has been somewhat sarcastically put as insuring against everything but loss."



his limited vision of the public interest, his ignoring the question of comparative security, his inconclusive references to the time factor, his near oblivion to the pressure groups which create disinclination, and all the other insubstantial grounds of his pessimism. Still one final query remains. Just what does Professor Powell mean by this "extensive remodelling" of recordation in which he finds his only hope? Does he mean a shift to tract indexes? Would he cancel obsolescent entries? Would he make the public records more conclusive? By what other reforms could he hope to remedy the acknowledged evils? Yet if he makes such reforms, what he will have — strange paradox — is not "recordation" but the abhorred "registration." Here again dichotomy is too easy. The fact is, as our questions seek to make patent, that the sharp antithesis — between "recordation" and "registration" — about which Professor Powell builds his book is much too sharp; the logical outcome of any thoroughgoing reform of "recordation" can only be something which pretty closely resembles what most people now choose to call "registration."<sup>131</sup> Rough-hew it how he will, Professor Powell may be brought upon an unexpected end.

It is not our intention to suggest that land title registration is, in all of its current embodiments, a close approach to unavoidable perfection. *Per contra*. Important improvements are both easily possible and urgently needed. Indeed the chief merit in Professor Powell's book is in its unwitting demonstration, by the data on non-use, of the great need either to make registration compulsory or to provide a mode of voluntary initial registration so cheap that no opposition can preclude its public acceptance. In the working out of such reforms we could learn much from the experience of England. There, after various attempts to encourage voluntary entry into the system had failed, registration of at least a "possessory title," on the occasion of *any future sale*, was made compulsory, first in the County of London and more recently in three other thickly populated districts. Despite the initial hostility of all "public and private bodies," and especially of the legal profession, this system is now "working smoothly and efficiently and to the satisfaction of those it affects."<sup>132</sup> In this there are at least two ideas we could borrow. First,

131. See *supra* note 5. Note the fears of Bordwell, *Land Transfer* (1933) 9 *ENCLIC. SOC. SCIENCES* 127, 131. "While the government might take over the abstract books and make the unofficial lot and tract indexes official, thus rendering duplicate books unnecessary, to assume the tasks of the title insurance companies would amount practically to registration of title."

What Professor Bordwell ignores is that title registration does not require the state to assume the function of title insurance; it makes such insurance unnecessary—the *bona fide* purchaser is protected.

132. POWELL, 276-286. The last words quoted are those of "a committee appointed by the chancellor and headed by Lord Tomlin," reporting in May, 1930. *Id.* at 282. During "the first three years of compulsory registration in the County of London" there

the excellent transition device. We, too, could take advantage of the fact that on most mortgages and sales today title to the unit of land in question must be searched and usually even a lawyer hired; on such occasions registration could be required without imposing either undue expense upon the individual owner or an impossible burden upon existing public machinery. Additional costs to the individual owner might even be underwritten by the state and spread over several subsequent transfers. Next, the initial registration of a mere "possessory title." In England this permits a registrant to escape ministerial investigation of his title; an "owner" is allowed to register whatever title he claims, but his title does not become indefeasible until the lapse of a reasonable period of limitation. As has been indicated above, some similar expedient might enable us, even with our unique constitutional requirements, altogether to eliminate save in contested cases our costly initial judicial proceedings and so to provide that cheap mode of registration which could flourish despite opposition.<sup>133</sup>

The sum of all we would say takes us back to the basic social need with which we began. Assessed against contemporary demands for a greater diffusion of the benefits of land ownership, existing methods of land transfer are hopelessly anachronistic. To answer anew our opening query: there is no persuasive reason why a lot or a farm should not be as easily acquired and as securely held as a ship or a share of stock or an automobile.<sup>134</sup> It is only our astonishing tolerance of a functionless and costly ritual, inherited from days when land was seldom an object of commerce, that keeps us from institutional fulfilment of this now generally accepted ideal.<sup>135</sup> For a public being awakened by increasing governmental par-

---

were 32,268 initial registrations and "21,875 transactions affecting land theretofore registered;" all these required "only one resort to the courts." *Id.* at 278.

133. These and other proposed improvements are fully discussed in Fairchild and Gluck, *loc. cit. supra*, note 125; Russell and Bridewell, *loc. cit. supra* note 12; Sabel, *loc. cit. supra* note 73; Comment (1939) 48 YALE L. J. 1238.

Note the early approval of the statute of limitations device in Beale, *op. cit. supra* note 16, at 376. For model provisions see Connecticut House Bill 1333 (1939) §§ 99, 100, drafted by Walter Fairchild, of the New York bar. The period of limitation fixed by this bill is two years.

134. To the suggestion that a piece of land has been in existence longer than an automobile and, hence, more interests have accumulated, there is an obvious answer. The question is one of policy. For how long should interests be allowed to accumulate? On behalf of cheap and easy transfer, and of more effective utilization, it might be desirable to cut off interests accruing in the distant past—certainly if not properly evidenced in the public books. Cf. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 231 for our modern policy of favoring Statutes of Limitation.

135. Sometimes it is urged that to make land more liquid might encourage speculation and so defeat the beneficent purposes of reformers. Even so, why should we tolerate our present completely adventitious and wasteful mode of keeping it unliquid? Should we not rather, if the imagined danger materializes, work out some system of "non-liquidity" which adequately promotes the purposes in hand?

ticipation in the financing of land transactions,<sup>136</sup> the remedy is close to hand. It is a remedy which has been thoroughly tested and found entirely practicable in several of our own states and in many foreign countries, including England and her democratic dependencies. It requires only a relatively simple change in the keeping of the public books about land and that, after a short time, these books be made conclusive.<sup>137</sup> In no one of Professor Powell's many objections to this remedy have we been able to find just cause for alarm. Un-Americanism has been said to be the last refuge of a conservative; it is, if our analysis be sound, Professor Powell's only haven.<sup>138</sup> Yet what is there un-American about state operation of a monopoly business of such vital import to the community as that of land transfer?<sup>139</sup> Providing cheap, secure, and expeditious methods for such transfer would appear to be as much a public function as the carrying of the mails; indeed it has been so regarded for a much longer time—witness the activities of the Pilgrim Fathers.<sup>140</sup> If the Torrens system is un-American, it is not because it does not deal with a public function, but because, as Professor Powell suggests, we in a democracy cannot be as efficient as dictators and because our public personnel cannot be trusted to read and copy mortgages and deeds! With all due deference, we submit that what Professor Powell has produced, after his months of arduous labor, is no objective "collection of factual data" but just another batch of good, honest red herring.

---

136. Governmental agencies are not likely to endure with grace private taxes on land transfer; their participation in the lending function must eventually break the "ring" of title companies and private lending institutions. Note the activities described in Russell and Bridewell, *loc. cit. supra* note 12. See also Federal Farm Loan Bureau, Bulletin No. 1 (1918).

Furthermore, an extensive building boom can be expected to stir the profit motive in brokers and contractors and so to array them against the title lawyers and their cherished non-liquidity.

137. Compare developments in motor vehicle registration statutes. Comment (1939) 48 YALE L. J. 1238, 1246.

138. True, Professor Powell does not use the word; but the emphasis is there. See note 53 *supra*. It is a stock argument of the opponents of title registration. Hence our elaboration.

139. Cf. White, *supra* note 10, at 5. "It is interesting, at times, to speculate on what might have been. Had the Massachusetts Colonists copied the first of the four systems mentioned by Professor Beale, to wit, the continental system of title registration, it is just possible that we title men, who wax so eloquent over the iniquities of the Torrens System, might today be proclaiming it as the great American system. One never can tell."

140. Viele, *supra* note 7, at 421.